PATERSON, SIMONS & CO. (M) SDN. BHD.

v.

PEMBANGUNAN LEASING CORP. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[CIVIL SUIT NO. D4-22(23)-1627-87]
28 MARCH 1989

CONTRACT: *Agreement to supply and install quarry plant - Defendants severally and jointly liable - Whether doctrine of election applies.*

The plaintiff is claiming against the defendants pursuant to a contract to supply quarry plant. On 7 July 1983, the 2nd defendant invited the plaintiff to tender for the supply of quarry plant for the 3rd defendant's company (a wholly owned subsidiary of the 2nd defendant).

The plaintiff submitted the tender and it was accepted by the 2nd defendant. Subsequently the 2nd defendant had arranged with the 1st defendant for a leasing facilities for the purchase of the quarry plant. An order was made by the 1st defendant. The plaintiff duly delivered the quarry plant and completed delivery by 16 August 1984. A bill was sent to the 1st defendant but he failed to make payment.

It seems that the 1st defendant had failed to conclude the leasing arrangements with the 2nd and 3rd defendants and therefore refused to pay the plaintiff.

The 1st defendant applied to the learned Senior Assistant Registrar ("SAR") for an order that the plaintiff's claim against the 1st defendant be dismissed on the ground that the plaintiff's claim against the 1st defendant is alternative to the claim against the 2nd and 3rd defendant and contended that the doctrine of election applies. The learned SAR decided that the doctrine applies and since the plaintiff had obtained judgment against the 2nd and 3rd defendants, the plaintiff was barred from proceeding against the 1st defendant.

The plaintiff appealed against the decision of the learned SAR.

Held:

The contract is between the plaintiff and all three defendant and the defendants are severally and jointly liable under the contract. Therefore, the contract does not make the defendants liable in the alternative but severally and jointly. In the event, it is no bar to an action against the 1st defendant even if the plaintiff has obtained judgment against the 2nd and 3rd defendants.

[Appeal allowed with costs.]

Other sources referred to:
Odgers' Principles of Pleading And Practice 20th Edn. p. 19

For the plaintiff/appellant - J. Rajaretnam; M/s. Chai Loy, Rahim & Co.
For the 1st defendant/respondent - Absent

JUDGMENT

Anuar Zainal Abidin J:

This is an appeal by the plaintiff against the decision of the learned Senior Assistant Registrar given on 15 April 1988 ordering that the plaintiff's claim against the 1st defendant be dismissed.

This appeal came up before me on 23 January 1989. The Counsel for the plaintiff/appellant was present. The Counsel for the 1st defendant/respondent was however absent. In the absence of the learned Counsel for the 1st defendant/respondent I proceeded to hear the appeal. The appeal was allowed with costs.

The 1st defendant made an application to the Senior Assistant Registrar by way of summons-in-chambers (encl. 11) for an order that the plaintiff's claim against the 1st defendant be dismissed. The grounds upon which the application was made were that the plaintiff's claim against the 1st defendant is alternative to the claim against the 2nd and 3rd defendants. As the plaintiff had obtained judgment against the 2nd and 3rd defendants the plaintiff is deemed to have elected to take remedy against the 2nd and 3rd defendants only and consequently to have abandoned the claim against the 1st defendant. The 1st defendant contended that the doctrine of election applies.

The plaintiff's case is that on 7 July 1983 the 2nd defendant invited the plaintiff to tender for the supply and installation of a quarry plant for the 3rd defendant's company which is a wholly owned subsidiary of the 2nd defendant.

The plaintiff submitted its tender to the 2nd defendant and on 29 September 1983 the tender was accepted. The 2nd defendant subsequently arranged with the 1st defendant for a leasing facilities for the purchase of the quarry plant.

On 11 January 1984, the 1st defendant by a confirmed purchase order ordered for the "fabrication, supply, delivery and installation" of a quarry plant on the 2nd defendant's land. The plaintiff delivered the machinery. The fabrication, supply, delivery and installation was completed by 16 August 1984.

On 6 September 1984, the plaintiff sent a bill to the 1st defendant for RM2,105,844 as the contract price for the plant. The 1st defendant, however, failed to pay the amount. It would seem that the 1st defendant had failed to conclude the leasing arrangements with the 2nd and 3rd defendant and therefore refused to pay the plaintiff.

The learned Senior Assistant Registrar decided that the doctrine of election applies and since the plaintiffs have obtained judgment against the 2nd and 3rd defendants the plaintiffs are barred from proceeding against the 1st defendant.

A passage in *Odgers' Principles of Pleading And Practice*, 20th Edn. at p. 19, states the principle of election clearly. The passage reads:

> If, however, a contract made by two or more persons be several as well as joint, the plaintiff may sue one or more or all of them in the same action. if he joins them all, he can in the same action claim against all of them jointly, and also against each of them severally. If he does not join them all, then he can only rely on the several liability of those whom he has chosen to sue.
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> If the contract be several and not joint, the plaintiff may, at his option, join as parties to the same action all or any of the persons liable thereon, and a judgment against one of several persons jointly and severally liable on one contract is no bar to an action against the others ...

Again there may be a contract on which one or other of two persons is liable in the alternative, but not both. If judgment is taken against one of them, that is a conclusive and irrevocable election and a bar to further proceedings against the other ...

In the present case the contract is between the plaintiffs on the one hand and the three defendants on the other hand. The defendants are severally and jointly liable under the contract. If therefore the plaintiffs have obtained judgment against the 2nd and 3rd defendants it is no bar to an action against the 1st defendant. This is so because the contract does not make the defendants liable in the alternative but severally and jointly liable.

For the reasons above I would allow this appeal with costs.

Also found at [1989] 2 CLJ 209